No. 09-1567

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

v.

ASTORIA GENERATING COMPANY, L.P.,
ORION POWER NEW YORK GP, INC., and
ELLIOTT TURBOMACHINERY CO., INC.,

Respondents.

On Petition For A Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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July 23, 2010

COUNTER-QUESTIONS PRESENTED

1. Did Petitioner present compelling reasons for this Court to grant the Petition, where the decision of the New York Court of Appeals that *Gowanus Bay No. 1* is a "vessel" is a fact-specific application of this Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and is consistent with recent opinions of the Seventh and Eleventh Circuits?

2. Did Petitioner present compelling reasons for this Court to grant the Petition, where the Record contains no facts to help this Court resolve an apparent conflict among the Circuits concerning whether an indefinitely moored riverboat casino is a "vessel", where Petitioner would be taking the opposite position from the injured workers in the cases which present the conflict, and where the state courts have already dismissed his cause of action for common-law negligence based on the very same state law standards he seeks to import into 33 U.S.C. § 905(b)?

3. Did Petitioner present compelling reasons for this Court to grant the Petition, where the decision of the Court of Appeals expressly avoids the broader issue presented in many more cases whether federal maritime liability standards impliedly preempt the application of New York Labor Law §§ 240(1) and 241(6) to accidents involving construction workers on navigable waters?

CORPORATE DISCLOSURE STATEMENT

Elliott Ebara Company Limited and Ebara Corporation are the publicly held parent corporations of Respondents Elliott Turbomachinery Co., Inc., and Elliott Company.

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INTRODUCTION

This case involves a highly fact-specific application of the criteria set forth by this Court in *Stewart v. Dutra Construction*, for determining whether an unusual watercraft is a "vessel" for the purposes of the Longshore and Harbor Workers Compensation Act ("LHWCA"). After determining that *Gowanus Bay No. 1*, a power generating barge, is a vessel, the New York Court of Appeals held that section 905(b) of the LHWCA expressly preempts sections of the New York Labor Law which would otherwise have imposed strict and vicarious liability for a workplace accident on the owner of that vessel and disrupted the uniform federal scheme governing compensation for maritime workers and liability for maritime torts.[1] This Court should deny the Petition because no error was committed below, and certiorari is rarely appropriate when the asserted errors consist of erroneous factual findings or the misapplication of properly stated rules of law.

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[1] This Court has already held that the New York Labor Law has no application in a negligence action brought in a state court by a ship repairer who fell from a broken plank scaffold into the hold of a ship. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). The decision predates the enactment of the LHWCA but, like Petitioner, the injured worker in that case would today be covered by the LHWCA. *Dahl* was last cited by this Court in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 813 (2001)(recognizing a maritime remedy for wrongful death rather than require an admiralty court to accommodate a state remedial statute).

Petitioner asserts there is a conflict among the Circuits concerning the application of the *Stewart* criteria to indefinitely moored riverboat casinos in the Fifth, Seventh and Eleventh Circuits. *See De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185 (5th Cir. 2006), *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), and *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). The Record in this case, however, contains no facts to help this Court discriminate among the various types of non-cruising casinos, and the decisions below do not address the application of the Jones Act to land-based casino staff (i.e., waiters and bartenders), which is the real issue underlying most decisions concerning the "vessel" status of such casinos. In addition, Petitioner's negligence argument is moot because the New York state courts have already dismissed his cause of action for common-law negligence based on the very same state law standards he seeks to import into 33 U.S.C. § 905(b).

Finally, this atypical case should not be the vehicle for deciding whether liability for injuries to marine construction workers in New York should be governed by state or federal standards. If, however, this Court decides to grant the Petition, it should direct the parties to brief the issue whether *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), was rightly decided.

STATEMENT OF THE CASE

Petitioner James Lee was injured while working for Elliott on a barge floating on navigable water. He applied for and was awarded benefits under the LHWCA because he was injured while working on navigable water. *Lee v. Elliott Turbomachinery*, BRB No. 02-0761 (July 23, 2003) (unpublished decision).

After Petitioner successfully asserted he was injured at a maritime situs while performing traditional maritime work and was, therefore, a "covered employee" entitled to LHWCA benefits, he commenced an action to recover damages for personal injuries in Supreme Court, New York County, alleging that the defendants violated New York Labor Law §§ 200, 240(1) and 241(6). Defendants, in turn, commenced a third-party action against Elliott seeking common-law and contractual indemnification under New York law.

New York Labor Law

Labor Law § 200 codifies the common-law duty imposed on owners, employers and contractors to provide workers with a reasonably safe place to work. *Comes v New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). *See also* Pet. App. C, 83a-84a and Pet. App. B, 35a.

By contrast, Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in construction, excavation, or

demolition. *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

Labor Law § 240(1), also known as the Scaffold Law, affords special protection to construction workers engaged in activities that "entail a significant inherent risk because of the relative elevation at which the activities must be performed or at which materials or loads must be positioned or secured." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991).

Labor Law §§ 240(1) and 241(6) are near mirror images of the shipowner's liability to longshore and harbor workers for unseaworthiness which was abolished by the enactment of the 1972 amendments to the LHWCA, including 33 U.S.C. § 905(b). *See Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 164-166 (1981).

The Scaffold Law predates workers' compensation laws and was originally enacted to protect the workers building Manhattan's skyscrapers;[2] but its reach has expanded. The present statute, Labor Law § 240, was adopted in 1921 and was derived from sections of its predecessor. The statute has developed an extensive judicial gloss; there are over 1,000 appellate cases discussing various aspects of Labor Law § 240(1).

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[2] The initial legislation was enacted in 1885 under the title, "An act for the protection of life and limb". *See Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 (2003), *Connors v. Boorstein*, 4 N.Y.2d 172 (1958).

The Scaffold Law currently imposes absolute (strict) liability on an owner or general contractor who fails to provide safety devices, e.g., ladders, scaffolds, ropes, constructed, placed, operated and maintained to give proper protection to the person performing the work. The duty is non-delegable. The plaintiff only needs to prove that the statute was violated and that the violation was a proximate cause of his or her injury. *Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Negligence, including the plaintiff's comparative fault, and notice are irrelevant; however, the New York Court of Appeals has held that an owner or contractor is not liable under the statute if the worker's own negligence was the sole proximate cause of his or her injuries.

This Court once held that the Scaffold Law had no application in a negligence action brought in a state court by a ship repairer who fell from a broken plank scaffold into the hold of a ship. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). The only other reported decision of this Court concerning these sections of the New York Labor Law is *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940), holding that a general contractor was not relieved of its obligations under the Labor Law simply because exclusive authority over the site of the post office it was building in New York City had been transferred to the federal government with the consent of New York.

Proceedings below

Elliott and the defendants moved for summary judgment dismissing the complaint because there was no evidence of negligence on the part of the defendants, and sections 240(1) and 241(6) of the New York Labor Law were expressly preempted by 33 U.S.C. § 905(b) which eliminates the warranty of seaworthiness and provides that a covered employee may bring an action for damages caused by "the negligence of a vessel".

Petitioner argued that the Labor Law was not preempted because the barge was not a "vessel" under *Stewart v. Dutra*, and because his action was outside the scope of federal admiralty jurisdiction.[3]

Elliott and the defendants replied that *Gowanus Bay No. 1* met the criteria in *Stewart* for finding that the barge was a vessel. It was a watercraft floating on water, and was not permanently moored. It was capable of being used for marine

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[3] Because Petitioner was not required to show that his injury occurred on a "vessel" to prevail on his claim for LHWCA benefits, he is not estopped to deny that the barge was a vessel. However, as the dissenting justice in the Appellate Division pointed out, in the administrative proceedings on the claim for LHWCA benefits, Petitioner's counsel specifically argued that Petitioner's work on the barge "subjected [him] to a certain element of danger which comes with working on the water"; that "the barge rocks and moves with wind and the tide"; and that plaintiff's work was "not land-based." Petitioner's counsel even referred to the barge as a "vessel." *Lee v. Astoria Generating Co., L.P.*, 55 A.D.3d 124, 143 (1st Dept. 2008) (dissenting opinion) (Pet. App. B, 50a).

transportation because it had previously been moved long distances by tugboat, two of its sister barges had been moved to provide electricity to another location, and it could be used for that purpose again. It was registered with the U.S. Coast Guard.

Elliott and the defendants also argued that this case met all the criteria for maritime tort jurisdiction because Petitioner was injured on navigable water while repairing a watercraft, and that maintaining floating power stations was a traditional maritime activity.

The motion court dismissed the complaint, finding that the barge was a vessel and that Labor Law §§ 240(1) and 241(6) were preempted by section 905(b) of the LHWCA (Pet. App. C, 79a-83a). The motion court also held that there was no evidence of negligence to support a claim under Labor Law § 200 against the defendants (Pet. App. C, 83a-84a).

On appeal, the Appellate Division of the Supreme Court reversed that determination, holding as a matter of law that the barge was not a vessel, (Pet. App B, 30a-32a), and that the Labor Law would not be preempted even if it were (Pet. App. B, 36a-38a). The Appellate Division also granted Petitioner summary judgment on the issue of liability under Labor Law § 240(1), even though Petitioner had not requested that relief in his moving papers (Pet. App B. 32a-33a). One justice dissented, arguing that the barge met the *Stewart* criteria, and that the Labor Law was expressly preempted by section

905(b) of the LHWCA (Pet. App B, 39a-55a). All of the justices agreed that the common-law negligence claim under Labor Law § 200 was properly dismissed.

Elliott and the defendants appealed to the Court of Appeals with the permission of the Appellate Division. The Court of Appeals, in a 5-2 decision, reversed the order of the Appellate Division, and reinstated the order dismissing the complaint (Pet. App A, 20a), holding that the barge was a vessel as a matter of law under *Stewart*, and that section 905(b) of the LHWCA expressly preempted Labor Law §§ 240(1) and 241(6) (Pet. App. A, 8a-10a). The Court of Appeals also denied Petitioner's motion for reargument.

Misstatements in the Petitioner's Brief

The barge is not permanently moored, contrary to Petitioner's statements at Pet. Br. i and 24. The motion court took issue with Petitioner's previous statement to that effect. See Pet. App. C 77a. In 1975, a New York court described the manner in which the barges are moored to the pier as follows:

> The barges are connected to the pier by means of a series of so-called 'spud and clamp' fixtures, each of which essentially is a clamp on the barge which is designed to fit an H-shaped beam or spud on the pier. The clamp slides vertically along the beam in response to tidal variations and is self-tending. The barges are also connected by vari-

> ous auxiliary power and control wirings, gangways, telephone lines, feeder cables and associated equipment, supply pipes, etc. Con Ed's claim is uncontroverted that all connections can be severed and the barge can put to sea, if desired, in eight to twelve hours.

Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc.2d 1065, 1067 (Sup. Ct., Kings. Co. 1975).

In 1998, when a Con Edison employee was injured on one of the barges and applied for LHWCA benefits, the Benefits Review Board of the U.S. Dept. of Labor described the barges as follows:

> The facts involved in this case are not in dispute. Employer supplies electricity to consumers. In 1969, employer began to generate electricity from gas turbine powered generators located on barges at two sites along Upper New York Bay in Brooklyn, New York known as Gowanus and the Narrows. Each barge has two 12–ton spud beams which affix the barge to a pier by 10 stud bolts. The barges can be disengaged from the pier and transported by tugboat to dry dock for maintenance and repairs; moreover, the barges can be removed and transported by water to other locations to supply needed electricity to other parts of New York City.

Caserma v. Consolidated Edison, BRB No. 97-0770, 1998 WL 155555 (March 6, 1998).

There is no basis in the Record for Petitioner's statements that "the electrical generating station [sits] atop the floating platform and the rest of the Second Avenue facilities" (Pet. Br. 11) or that the "structure" consists of "two components, a barge and a power plant structure on top thereof" (Pet. Br. 13). Again, the court in *Consolidated Edison v. City of New York* described the barges as follows:

> Each barge is approximately 215 feet long, 79 feet wide and 12 feet deep with a superstructure rising at least 56 feet above the water line. Each barge houses eight gas turbine generators developing a total of 622,000 kilowatts, together with auxiliary equipment, associated apparatus and various connections with the shore. The electric power generated is transmitted by feeder cables suspended from 'take-off towers' leading to similar towers on the pier and then to the substation.

Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc.2d at 1066, 365 N.Y.S.2d at 379.

It is also incorrect to say that "[t]estimony from the operator confirmed that the floating platforms were built for the sole purpose of supporting the power plants and they were never intended to operate as vessels in navigation." (Pet. Br. 8). To the contrary, the witness in question testified that his employer, Astoria/Orion, had no present plans to

move the barges, but probably would move them given sufficient economic justification. See also *Consolidated Edison Company of New York, Inc. v. City of New York*, 80 Misc.2d 1065, 1068 (Sup. Ct., Kings Co. 1975), in which Con Edison, as the owner of the power barges, argued that the barges were not specially adapted for the use of that particular substation, and that Con Edison never intended that the barges become part of its realty at that location. Indeed, the barges, but not the realty, were subsequently sold by Con Edison to Astoria/Orion (Pet. App. C, 57a-58a).

Petitioner repeatedly refers to the preservation of his state law claims by 33 U.S.C. § 933. See, e.g., Pet. Br. 9, 32. However, this Court has consistently interpreted § 933 to preserve federal maritime claims as well as state claims. See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, *supra*, 532 U.S. at 819, and cases cited. Section 933 of the LHWCA is not a mandate to apply state law to actions by covered employees against non-vessels.

REASONS FOR DENYING THE PETITION

THE COURT OF APPEALS' DECISION DOES NOT IMPLICATE ANY OF THE TRADITIONAL FACTORS THAT THE COURT ROUTINELY RELIES UPON IN GRANTING CERTIORARI

The Petition does not meet any of the criteria governing discretionary review in Rule 10 of this Court, which provides that:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

A) The Petition should be denied because this case is simply a fact-specific application of *Stewart v. Dutra* by a state court

This Court's Rule 10 provides in part, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The decision of the New York Court of Appeals that *Gowanus Bay No. 1* is a vessel is a fact-specific application of this Court's decision in *Stewart v. Dutra Construction*, *supra*, which is consistent with the results reached in *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), and *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008), and does not present any compelling reasons for review. Petitioner argues that the Court of Appeals misapplied the *Stewart* criteria; however, his contentions do not warrant review because he merely questions the Court of Appeals' application of the criteria set forth in this Court's decision.

Factors indicating that *Gowanus Bay No. 1* is a "vessel" include the fact that (a) it was built in a shipyard, (b) it floats, (c) it is not permanently moored, (d) it can be moved by tug boat to alternative locations, (e) its ability to provide emergency power to shoreside locations serves a maritime purpose, and (f) it is registered with the U.S. Coast Guard. As this Court held in *Stewart*, a "vessel" for purposes of the LHWCA "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment," and "[d]espite [any] seeming incongruity of grouping [the craft] alongside more traditional seafaring vessels." *Stewart, supra*, 543 U.S. at 497.

Contraindications include the fact that it is not self-propelled, it is not adapted for carrying cargo or passengers, and it has not moved from its pier except to dry dock for maintenance. *Stewart* teaches that these factors are not particularly relevant. Lack of propulsion and a special purpose do not prevent *Gowanus Bay No. 1* from being deemed a "vessel". *Stewart* and *Belle of Orleans* teach that, as long as the watercraft has not been permanently disabled from sailing, the present intentions of the owner are also not dispositive of the "vessel" issue.

In *Tagliere*, a casino patron who fell while playing a slot machine on a riverboat casino sued in federal court under its admiralty jurisdiction because she needed the three-year statute of limitations for tort claims. The district court dismissed

the complaint for lack of jurisdiction. The Seventh Circuit, construing the Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. § 740, held that an indefinitely moored casino was not "permanently moored" in the *Stewart* sense because there was no evidence that the casino had been disabled from sailing, and could therefore be a "vessel" for jurisdictional purposes.

In *Belle of Orleans*, the Eleventh Circuit held that an indefinitely moored, but fully operational, riverboat casino was a "vessel" for the purpose of establishing admiralty jurisdiction, even though its owners had informed the U.S. Coast Guard that they intended to operate in a continuously moored status. The court held that the apparent intent of the owners of a boat was not dispositive of whether the boat was a "vessel", because state laws and owners' intentions can change, and jurisdictional rules intended to be uniform should not be subject to such vagaries. *Belle of Orleans*, *supra*, 535 F.3d at 1311-1312.

Applied to the facts of this case, *Tagliere* teaches that *Gowanus Bay No. 1* has not been "permanently moored" because it has not been disabled from sailing. *Belle of Orleans* teaches that the owners' apparent intent to keep the power barges moored to the pier in Brooklyn does not cause them to lose their status as "vessels" capable of being used for marine transportation. Accordingly, there are no grounds to conclude that this case was wrongly decided, much less to find a compelling reason to review the decision of a state court on a properly

stated point of federal law. As noted in Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

B) The Petition should be denied because the Court of Appeals' decision does not conflict with relevant decisions of this Court or a United States Court of Appeals

Contrary to Petitioner's argument, this is not a case in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. Rule 10(b).

1) This case has nothing to do with casino boats in the Fifth Circuit

Petitioner argues that there is a conflict among the circuit courts concerning the vessel status of indefinitely moored riverboat casinos after *Stewart*, citing *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008); *DeLaRosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185 (5th Cir. 2006); and *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied*, 543 U.S. 942 (2004). This case, however, does not involve a riverboat casino and relates to that conflict only in the most general sense.

The Record in this case would not help this Court resolve the conflict among the Circuits concerning the "vessel" status of indefinitely moored riverboat casinos. As one distinguished commentator has pointed out, applying the *Stewart* test to riverboat casinos requires discrimination among different types of non-cruising casinos. David W. Robertson, "How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and other areas of Maritime Law", 39 J. Mar. L. & Com. 115, 131-32 (April 2008). Because this case does not involve a non-cruising casino, the Record contains no facts which would help this Court identify the factors that would enable courts to usefully discriminate among the different types of non-cruising casinos in the future. For instance, the Record in this case does not address one of the crucial factual issues in the casino boat cases because it does not establish whether the present owners of *Gowanus Bay No. 1* ever made a decision or stated their intention to "permanently moor" their four power barges, as did the owners of the *Belle of Orleans* when they informed the U.S. Coast Guard of their intentions. *Belle of Orleans*, *supra*, 535 F.3d at 1304.

In addition, the conflict between the Fifth and Eleventh Circuits is more apparent than real, and may only reflect the reluctance of the Fifth Circuit to extend admiralty jurisdiction to patrons and wait staff on casino boats. Compare *DeLaRosa v. St. Charles Gaming Co.*, *supra*, 474 F.3d at 187-88 (customer on non-cruising casino boat had no claim

under admiralty jurisdiction), to *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441 (5th Cir. 2006) (floating dormitory for dredging crew is a vessel for Jones Act purposes). The apparent conflict is not fully developed, and could resolve itself as courts in the Fifth Circuit begin to examine other prerequisites for qualifying for seaman status under the Jones Act such as whether the worker's connection to the vessel was substantial both in nature and duration, as this Court suggested in *Stewart*, 543 U.S. at 494-95.

Finally, certiorari should be denied because the Petitioner in this case would be making an argument to this Court that is contrary to the interests of most workers injured aboard watercraft on navigable waters. In most of the cases cited, the injured worker is asserting admiralty jurisdiction and seeking a jury trial under the Jones Act because the only remedy under state law is workers compensation. Such workers want floating casinos to be "vessels". In this case, Petitioner is seeking to avoid admiralty jurisdiction and "vessel" status because he wants the New York courts to apply local legislation which affords construction workers greater rights than most workers in New York and elsewhere. A victory for Petitioner concerning the vessel status of indefinitely moored watercraft would be a setback for most amphibious workers in this country.

2) Petitioner's claim against Astoria/Orion is within the admiralty jurisdiction

Petitioner's second argument is essentially that the New York courts erred in failing to expressly hold that his case was within the admiralty jurisdiction of the federal courts. Citing *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285 (5th Cir. 2008), he argues that he should be permitted by 33 U.S.C. § 933 to bring an action against Astoria/Orion based on state law even if the barge is a "vessel" because his claim against the vessel was not a *maritime* tort. *McLaurin*, 529 F.3d at 289-90.

The New York Court of Appeals (Pet. App. A, 7a) and the dissenting justice at the Appellate Division (Pet. App. B, 49a) found it unnecessary to decide whether Petitioner's claims satisfied the status test for admiralty jurisdiction because his claim was indisputably covered by the LHWCA, and his claim against Astoria/Orion, the owner of the "vessel", was indisputably covered by 33 U.S.C. § 905(b).

According to *McLaurin* and *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir. 1986), the New York Court of Appeals omitted a step from its analysis. It should first have determined whether Petitioner's claim against the "vessel" met the tests for maritime tort jurisdiction before deciding whether Petitioner's claim against Astoria/Orion was covered by § 905(b). The plaintiffs in *McLaurin* and *May* were injured on land (Pet. Br. 31 n 7), unlike Petitioner in this case and, there-

fore, their tort claims did not satisfy the situs requirement for admiralty jurisdiction.

The apparent oversight is immaterial, and does not provide a compelling reason for this Court to grant review because Petitioner's claim is clearly within the admiralty jurisdiction. As this Court has stated, it reviews "judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioner's claim meets the situs test for admiralty jurisdiction because he was physically on actual navigable water when he was allegedly injured. *See Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 416 (2d Cir. 2005) ("a person on any object floating in actual navigable waters must be considered to be on actual navigable waters").

Petitioner's claim meets the status test because he was overhauling one of the gas turbines on the barge when he was allegedly injured. Ship repair is certainly a maritime activity, because it is one of the core activities defining the term "harbor worker" under the LHWCA. 33 U.S.C. §§ 902(3) and 905(b). Federal circuit courts have held that workers repairing or installing machinery on ships are engaged in traditional maritime activity for jurisdictional purposes. See *Martinez v. Pacific Indus. Service Corp.*, 904 F.2d 521, 524 (9th Cir. 1990) ("Cleaning the boilers of a ship is a traditional maritime activity. The fact that it is now done by hydroblast does not alter its essential character.");

Alderman v. Pacific Northern Victor, Inc., 95 F.3d 1061, 1064 (11th Cir. 1996) (carpenter installing an elevator during a ship conversion was engaged in maritime activity even though he alleged he was merely a "construction worker").

In addition, Petitioner established his claim for benefits under the LHWCA by showing that his presence aboard the barge was neither transient nor fortuitous. That showing alone may be sufficient to meet the status test for admiralty jurisdiction. *See Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251, 254 (5th Cir. 2007) (injured carpenter met the situs and status tests for LHWCA coverage because the presence of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous).

Accordingly, Petitioner's claims satisfy both the situs and status tests for maritime tort jurisdiction, and the Court of Appeals did not err in holding that the maritime law applied to his case. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

3) Petitioner's negligence claim was dismissed on state law grounds

Petitioner's final argument (Pet Br. 32-35) does not provide appropriate grounds for review by this Court because the New York state courts have already dismissed Petitioner's cause of action for common-law negligence (Labor Law § 200) against the owner of *Gowanus Bay No. 1* based on the very

same state law standards he seeks to import into 33 U.S.C. § 905(b) (Pet. App. C, 83a-84a). In *O'Hara v. Weeks Marine, supra*, the Second Circuit expressly noted the similarity between Labor Law § 200 and 33 U.S.C. § 905(b). There is no reason to think that the New York courts would view Petitioner's negligence claim differently following review by this Court.

C) The Petition should be denied because the Court of Appeals avoided the real issue in this case

The real issue in this case is not whether *Gowanus Bay No. 1* is a "vessel" under 1 U.S.C. § 3 and *Stewart*. The real issue is whether state liability standards in general, and New York Labor Law §§ 240 and 241 in particular, may ever be applied to a workplace accident on navigable water. The New York Court of Appeals held in *Cammon v. City of New York*, 95 N.Y.2d 583 (2000) that the general maritime law does not preempt New York Labor Law §§ 240(1) and 241(6) in such a case. It distinguished *Cammon* from the facts of this case because Petitioner was injured on a "vessel" and therefore, his claim was governed by a federal statute, 33 U.S.C. § 905(b), which expressly preempted all other remedies (Pet. App. A, 9a-10a).

Cammon conflicts with decisions of this Court and the United States courts of appeals. See *Yamaha Motor Corporation U.S.A. v. Calhoun*, 516 U.S. 199, 216 n 14 (1996), in which this Court noted that the standards governing liability in maritime tort

cases had to be distinguished from the rules on remedies, and the Third Circuit held, following remand, that federal standards should govern liability. *Calhoun v. Yamaha Motor Corporation, U.S.A.*, 216 F.3d 338, 351 (2000), *cert. denied*, 531 U.S. 1037 (2000). More to the point, this Court has already held that the New York Labor Law has no application in a negligence action brought by a ship repairer who fell from a broken plank scaffold into the hold of a ship, *Robins Dry Dock & Repair Co. v. Dahl, supra*, 266 U.S. at 449, but the New York Court of Appeals in *Cammon* ignored *Dahl*, evidently believing that decisions from the *Lochner* era are no longer binding precedent.[4] However, *Dahl* was a unanimous decision of this Court and deserves greater respect than either *Lochner v. New York*, 198 U.S. 45 (1905), or *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which Justice Stevens criticized in a concurring opinion in *American Dredging Co. v. Miller*, 510 U.S. 443, 458-59 (1994).

The issue whether the general maritime law impliedly preempts claims under Labor Law §§ 240 and 241 should not be reviewed in this case, however, because the New York Court of Appeals avoided it by holding that 33 U.S.C. § 905(b) expressly preempted Petitioner's state law claims and reached the right result. The parties have also largely avoided it by focusing their arguments on "vessel" status, admiralty jurisdiction, and the

[4] *See Gravatt v. City of New York*, 1998 WL 171491 (S.D.N.Y. 1998) (cited in *Cammon, supra*, 95 N.Y.2d at 590 and 595).

LHWCA. The broader issues under the general maritime law should be reviewed in the broader context in which they usually arise in New York, *i.e.*, an action by a covered employee under 33 U.S.C. § 933 against a non-vessel contractor or riparian owner in which it is unclear whether state or federal law should apply. Numerous opportunities will arise. *See, e.g., O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Vasquez v. GMD Shipyard Corp.*, 582 F.3d 293 (2d Cir. 2009).

Should this Court decide to grant the Petition in this case, it should direct the parties to brief the issue whether *Cammon v. City of New York, supra*, which has been criticized, was correctly decided.[5]

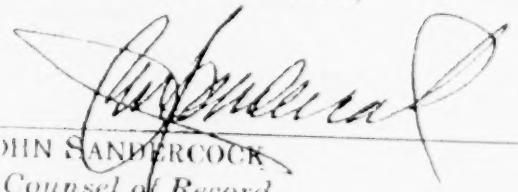
[5] *See, e.g.*, Raymond C. Green, "Federal General Maritime Law or State Law. Which Rules in Marine Construction Workers' Tort Actions Against Third Parties", 3 Benedict's Mar. Bull. 289 (3d Quarter 2005).

CONCLUSION

Petitioner has not provided this Court with any compelling reasons to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Dated: New York, New York
July 23rd, 2010

Respectfully submitted,



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